

*2D*  
Office - Supreme Court, U. S.  
FILED

JUL 14 1942

CHARLES ELMORE MOBLEY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

---

No. 229

---

ALABAMA POWER COMPANY,

*Petitioner,*

*vs.*

FEDERAL POWER COMMISSION.

---

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT  
THEREOF.

---

H. C. KILPATRICK,  
P. W. TURNER,  
WALTER BOULDIN,  
W. M. MOLONEY,  
*Counsel for Petitioner.*

MARTIN, TURNER & McWHORTER,  
*Of Counsel.*



## INDEX.

### SUBJECT INDEX.

	Page
A. Petition for writ of certiorari.....	1
Summary statement of matter involved.....	1
Jurisdiction.....	2
Statute involved.....	3
Summary statement of the case.....	3
Questions presented.....	6
Questions concerning propriety of the disallowance of items of claimed cost.....	7
Reasons relied on for allowance of the writ.....	9
B. Brief in support of petition for writ of certiorari.....	13
Opinions below.....	13
Jurisdiction.....	13
Statute involved.....	14
Statement of the case.....	14
Specification of errors to be urged.....	14
I. Respondent's order that disallowed items be charged to petitioner's earned surplus account is void as a denial of due process of law in that petitioner was afforded no notice or hearing on the question whether the amount of such disallowed cost items should be eliminated from accounts reflecting petitioner's investment in its utility properties nor does the record reveal any finding in support of such order.....	16
II. Respondent exceeded its jurisdiction in requiring charge of disallowed items to petitioner's earned surplus account.....	21

### TABLE OF CASES.

<i>Alabama Power Co. v. McNinch, et al.</i> , 94 F. (2d) 601 ..	3, 13
<i>American Telephone &amp; Telegraph Co. v. United States</i> , 299 U. S. 232, 240, 81 L. Ed. 142, 149 .....	9
<i>Atchison, Topeka &amp; Santa Fe Ry. Co. v. United States</i> , 295 U. S. 193, 201-203, 79 L. Ed. 1382 .....	10

	Page
<i>Elyton Land Co. v. Birmingham Warehouse &amp; Elevator Co.</i> , 92 Ala. 407, 425, 9 So. 129, 135.....	22
<i>Interstate Commerce Commission v. L. &amp; N. R. R. Co.</i> , 227 U. S. 88, 57 L. Ed. 431.....	20
<i>Louisville Gas &amp; Electric Co. v. Federal Power Commission</i> , No. 8564.....	11
<i>Mahler v. Eby</i> , 264 U. S. 32, 44-45, 68 L. Ed. 549.....	10, 20
<i>Morgan v. United States</i> , 298 U. S. 468, 80 L. Ed. 1288, 304 U. S. 1, 18, 25, 82 L. Ed. 1129, 1132, 1136.....	10
<i>Northwestern Electric Co. v. Federal Power Commission</i> , 125 F. (2d) 882.....	11
<i>Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio</i> , 301 U. S. 292, 81 L. Ed. 1093.....	20
<i>Panama Refining Co. v. Ryan</i> , 293 U. S. 388, 431-433, 79 L. Ed. 446.....	10, 20
<i>Shields v. Utah-Idaho Ry. Co.</i> , 305 U. S. 177, 182, 83 L. Ed. 111, 116.....	10, 20
<i>State, ex rel. White v. Citizens Light &amp; Power Co.</i> , 172 Ala. 232, 236, 55 So. 193, 194.....	22
<i>United States v. Baltimore &amp; Ohio R. R. Co.</i> , 293 U. S. 454, 462-465, 79 L. Ed. 587.....	10
<i>Wichita R. R. Co. v. Public Utilities Commission</i> , 260 U. S. 48, 58-59, 67 L. Ed. 124.....	10, 20

## STATUTES.

<i>Federal Water Power Act of 1920</i> , Section 201(a).....	21
<i>Section 240(a)</i> , Judicial Code, amended by Act of February 13, 1935 (28 U. S. C. A. 347).....	2, 13
<i>Section 313</i> , Federal Power Act, added by Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860 (16 U. S. C. A. Sec. 825 L).....	2, 13, 14
<i>Federal Power Act</i> , 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A. 791a-825r).....	3, 14
<i>Section 301(a)</i> , Federal Power Act [16 U. S. C. A. 825(a)].	17
<i>Alabama Code 1940</i> , Title 48, Sections 41-46, 302-322.	22
<i>Alabama Code 1940</i> , Title 10, Section 26.....	22
16 U. S. C. A. 824(b).....	21
16 U. S. C. A. 824(c) (f).....	21

## PUBLIC DOCUMENTS.

Report No. 621, 74th Congress, 1st Session.....	22
---	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

---

No. 229

---

ALABAMA POWER COMPANY,

*vs.*

*Petitioner,*

FEDERAL POWER COMMISSION.

---

**PETITION FOR WRIT OF CERTIORARI.**

---

*To the Honorable the Supreme Court of the United States:*

Your Petitioner, Alabama Power Company, respectfully says:

**1. Summary Statement of Matter Involved.**

This is a statutory proceeding for review of orders of the Federal Power Commission determining actual legitimate original cost of Petitioner's hydro electric project licensed under the Federal Water Power Act of 1920,<sup>1</sup> which require elimination from the stated investment on Petitioner's general books of account of amounts disallowed by the Respondent as actual legitimate original

---

<sup>1</sup> As amended, now cited as The Federal Power Act.

cost by requiring such amounts to be charged to Petitioner's earned surplus account.

Generally, the matters involved are (a) whether the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without, Petitioner maintains, notice, hearing, inquiry or evidence as to whether Petitioner's general investment accounts reflect no more than true investment in assets of continuing value as distinguished from actual legitimate original cost; (b) whether the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without a finding by the Commission that the amounts carried in such investment account exceed the true investment of such successor licensee in assets of continuing value; (c) the extent of the jurisdiction of the Federal Power Commission over the general investment accounts of Petitioner which are subject to the jurisdiction of and are being regulated by the Public Service Commission of Alabama; and (d) the validity of conclusions of law and the findings of fact upon which items claimed as project cost were disallowed.

### **Jurisdiction.**

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935 (28 U. S. C. A. 347), and Section 313 of the Federal Power Act, added by the Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860 (16 U. S. C. A., Section 825L). The first decree of the Court of Appeals (R. Vol. II, p. 1020) was entered September 27, 1937, the second decree of the Court of Appeals was

entered on March 30, 1942 (R. Vol. II, p. 893), and application for rehearing was denied April 29, 1942 (R. Vol. II, p. 910).

### **Statute Involved.**

The statute involved is the Federal Power Act, 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A., 791a-825r).

### **Summary Statement of the Case.**

The project is known as Mitchell Dam, Project No. 82, and is located on the Coosa River in the State of Alabama. Petitioner is the successor to the original licensee having acquired the licensed project and other unlicensed utility properties in a consolidation of three companies. Two hearings have been held before the Commission on the actual legitimate original cost of the project and the controversy has been twice before the United States Court of Appeals for the District of Columbia. On the first hearing, the Commission disallowed certain items of claimed cost and issued its opinion and order dated November 7, 1932, requiring Petitioner to set up accounts reflecting the actual legitimate original cost so determined (R. Vol. I, pp. 15, 18, 561). Suit to enjoin enforcement of such order as modified by order of December 19, 1932, was filed in the United States District Court for the District of Columbia in which the issues finally presented were whether the disallowed items constituted actual legitimate original cost as defined in the Federal Power Act. The District Court (R. Vol. II, p. 944) dismissed the bill on the merits. The Court of Appeals<sup>2</sup> reversed the case for further hearing before the Commission, holding that the Commission had erred with respect to disallowance of certain items of claimed cost while properly disallowing others. The second hearing was held by the Commission in 1939. In

---

<sup>2</sup> *Alabama Power Company v. McNinch, et al.*, 94 F. (2d) 601.

neither of the orders calling the hearings was there any statement that the Commission proposed to determine the validity of Petitioner's stated investment in its utility properties (R. Vol. I, pp. 153, 616), nor was any such issue tendered or testimony introduced with respect thereto by the Commission's staff or Petitioner during the course of either such hearing. Reference to the orders fixing the hearing will show that the hearing was limited to the subject of net investment, i.e., actual legitimate original cost, as of December 31, 1925, upon issues of fact presented by the Commission's preliminary accounting report and Petitioner's protest thereto. By opinion and order dated November 26, 1940, the Commission adjusted its previous determination of original cost. In such order, the Commission, in addition to requiring establishment of accounts reflecting such determination, required that the amount of the disallowed items (exclusive of one item) be charged to the earned surplus account of Petitioner, thus requiring that such amounts be entirely eliminated from the general investment accounts of Petitioner as well as from the project accounts reflecting the actual legitimate original cost of the project (R. Vol. I, pp. 19, 781).

On application for rehearing, Petitioner protested that the phase of the order requiring a reduction in Petitioner's investment accounts in the amounts disallowed as actual legitimate original cost had been made without affording Petitioner notice of or hearing upon the question whether amounts disallowed as original cost should be eliminated from Petitioner's general investment accounts; and Petitioner prayed for such a hearing (R. Vol. I, pp. 22, 27). The Commission denied the application and ordered Petitioner to show cause in writing under oath why its accounting requirements should not be made effective and submit to the Commission such accounting treatment as Petitioner might propose for disposition of disallowed items (R. Vol.

I, p. 28). Petitioner responded that the order should not be made effective because Petitioner had had no hearing upon that part of the order requiring reduction of its general investment accounts. With respect to such accounting treatment as might be proposed for the disallowed items, Petitioner responded that it proposed to institute court review of the Commission's order disallowing such items, that the decisions of the courts on such review would probably affect the proper accounting disposition of such items, and therefore, submitted that Petitioner could propose no authoritative accounting disposition in advance of such decisions. Petitioner also stated that it did not interpret the Commission's order as requiring answer based upon the hypothesis that the courts would affirm such disallowance, but, in effect, submitted itself to further instructions in that respect (R. Vol. I, p. 29, 39). No further instructions were given by Respondent. Such response was held insufficient and stay of the order was dissolved (R. Vol. I, p. 47). Petition for review was filed with the United States Court of Appeals for the District of Columbia and the order of the Commission was stayed on certain conditions pending the hearing of such petition (R. Vol. II, p. 863). On motion for such stay, Petitioner showed, that it was a successor to the original licensee; that it was a corporation created in 1927 (subsequent to the construction of the project) and had acquired the licensed project along with other unlicensed public utility properties in a consolidation of three corporations; and that the consideration for the whole of such properties acquired was equivalent in amount to the amount at which such properties were carried on the books of the constituent companies (R. Vol. II, p. 859).

Petitioner maintains that it is entitled to carry in its investment accounts the amount of the consideration so paid for its properties as a whole in the consolidation of

1927, whether or not the Commission's determination of actual legitimate original cost of the project to Petitioner's predecessor is correct, for the reason that such consideration reflects a true investment in assets of continuing value.

There was no evidence before Respondent with respect to such subsequent acquisition by Petitioner and no finding by Respondent as to what effect such acquisition should have upon Petitioner's investment accounts. No intimation was given Petitioner that any investment other than actual legitimate original cost was to be considered or affected by the proceeding.

Petitioner, therefore, further maintains that it had no hearing on the validity of its general investment accounts, because Respondent gave no notice that it intended to eliminate any amounts from such accounts, Respondent's notice and hearing being directed solely to determination of actual legitimate original cost. The Court of Appeals affirmed the order of the Commission on March 30, 1942, and Petitioner's application for rehearing and modification of mandate was denied April 29, 1942 (R. Vol. II, p. 910).

#### **Questions Presented.**

1. When a corporation acquires a completed licensed project, together with unlicensed utility properties, for a consideration equal to the recorded book value of such properties, may the Federal Power Commission lawfully require such corporation to write out of its general investment accounts an amount of such consideration equal to the amount thereafter disallowed by such Commission as actual legitimate original cost of the licensed project?
2. May the Federal Power Commission lawfully order the write-off described in question (1) above in a proceeding for the determination of actual legitimate original cost

only, and without notifying Petitioner that such action is proposed?

3. May the Federal Power Commission lawfully order the write-off described in question (1) above without a finding by the Commission that the amounts carried in such general investment accounts exceed true investment in assets of continuing value?

4. Does Respondent's order to show cause in writing under oath why Respondent's previously rendered order should not be enforced constitute the hearing provided for by Section 301(a) of the Federal Power Act and required by the due process clause of the Constitution?

5. Has the Federal Power Commission jurisdiction over the general accounts of an electric public utility and licensee which is also subject to comprehensive regulation, including regulation of its general accounts, by a duly constituted state public service commission?

#### **Questions Concerning Propriety of the Disallowance of Items of Claimed Cost.**

1. Is the amount of taxes paid on project lands more than three years prior to beginning of construction of project structures properly a part of the actual legitimate original cost of such project?

2. Is the interest on expenditures incurred more than three years prior to the beginning of construction of project structures properly a part of the actual legitimate original cost of such project?

3. Is the actual legitimate original cost of the lands and water rights acquired under the circumstances outlined at R. Vol. II, p. 948-50, 987-93, 1007-08, to be determined by

the value of the stock issued in the merger or consolidation there described?

4. In determining the value of particular lands and water rights, is it lawful to fix such value solely upon the basis of the cost of obtaining control of other lands and water rights which, in themselves, were insufficient to permit the comprehensive development of the licensed project as it now exists?

5. In determining the value of stock issued in the merger or consolidation described at R. Vol. II, p. 948-49, 988-90, by reference to the properties underlying such issue, may such value be lawfully fixed by reference solely to the consideration paid prior to the consolidation for control of certain of the properties involved which were in themselves insufficient for the contemplated development, or must effect be given to the value of the properties involved as a whole at the time of the consolidation?

6. Is a fee or profit, reasonable in amount, paid to an affiliated contractor corporation for the construction of a licensed project allowable as actual legitimate original cost?

7. When bonds of a purchaser are given for property, is the cost of such property measured by the principal amount of such bonds or the market value of such bonds?

8. Was a new corporation formed under the laws of Alabama in the merger and consolidation of 1913, referred to at R. Vol. II, p. 948-49, 988-90?

9. Was cost incurred in the merger or consolidation of 1913, referred to at R. Vol. II, p. 948-49, 988-90, regardless of whether a "new" corporation was formed under the laws of Alabama?

## Reasons Relied On for Allowance of the Writ.

### I.

The court below has held in effect that the Federal Power Commission may require elimination from the general investment accounts of a successor licensee of amounts disallowed by the Commission as actual legitimate original cost of a licensed project without regard to whether the recorded investment on the books of the successor licensee reflects no more than the true consideration paid for properties of continuing value by such successor corporation. Such holding does not give proper effect to *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 240 (81 L. Ed. 142, 149). This Court in its opinion in that case recognized the difference between original cost and the investment of the accounting utility and that the investment of the accounting utility might exceed original cost. The order of the Commission in this proceeding affirmed by the court below fails to recognize any distinction between actual legitimate original cost to Petitioner's predecessor and the present investment of Petitioner in its utility properties as a whole and has, upon mere determination of the former, entered an order reducing the latter. This case, therefore, presents one aspect of a question of vital importance in public utility regulation, to-wit, whether the accounts of utilities shall reflect original cost to the person first devoting the properties to public use only or whether such accounts may reflect the effect of subsequent transactions affecting investment of the present owners in properties of continuing value.

### II.

The holding of the court below that notice of hearing, purportedly one to determine the actual legitimate original cost of a licensed project, gave Petitioner notice that it must reduce its stated investment by the amount disallowed as actual legitimate original cost of such project does not give

proper effect to *Morgan v. United States*, 298 U. S. 468 (80 L. Ed. 1288), 304 U. S. 1, 18, 25 (82 L. Ed. 1129, 1132, 1136).

### III.

The court below has in effect held that the Federal Power Commission may lawfully require a successor to a licensee to eliminate from its general investment accounts amounts disallowed as actual legitimate original cost of a licensed project without any finding by the Commission that the amount carried in such general investment accounts exceeds true investment in assets of continuing value. Such holding by the court below does not give proper effect to the decisions of this Court in *Wichita R. R. Co. v. Public Utilities Commission*, 260 U. S. 48, 58-59, 67 L. Ed. 124; *Mahler v. Eby*, 264 U. S. 32, 44-45, 68 L. Ed. 549; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431-433, 79 L. Ed. 446; *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 462-465, 79 L. Ed. 587; *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 295 U. S. 193, 201-202, 79 L. Ed. 1382.

### IV.

The holding of the court below that Petitioner has foregone the opportunity to question the propriety of Respondent's order by reason of Petitioner's response to Respondent's order to show cause in writing under oath (R. Vol. I, p. 29) does not give proper effect to *Shields v. Utah-Idaho Ry. Co.*, 305 U. S. 177, 182 (83 L. Ed. 111, 116).

### V.

The court below has construed the Federal Power Act as conferring upon the Federal Power Commission jurisdiction to eliminate amounts from the general investment accounts of a licensee notwithstanding the fact that such accounts are subject to general regulation and supervision

by a duly constituted state agency (R. Vol. II, pp. 856, 857). To Petitioner and to licensees and public utilities generally such holding is of great immediate and future importance in that, as is now the case with Petitioner as a result of the order here involved, investment accounts of licensees and public utilities kept pursuant to state regulation may be inconsistent with those kept pursuant to orders of the Federal Power Commission, with consequent potential conflict between state and federal regulation, continuing impairment of efficiency in the conduct of the businesses of such licensees and utilities and confusion and uncertainty as to their legal rights and obligations. The question here involved has been decided adversely to Petitioner's contention by the Circuit Court of Appeals for the Ninth Circuit in the case of *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882, and by the Circuit Court of Appeals for the Sixth Circuit in the case of *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564, decided June 29, 1942.

WHEREFORE, it is respectfully submitted that this petition should be granted.

ALABAMA POWER COMPANY.

WILLIAM M. MOLONEY,

H. C. KILPATRICK,

P. W. TURNER,

WALTER BOULDIN,

*Attorneys for Petitioner.*

MARTIN, TURNER & McWHORTER,  
600 North 18th Street,  
Birmingham, Alabama,  
Of Counsel.

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1942

---

No. 229

---

ALABAMA POWER COMPANY,  
*v.* Petitioner,

FEDERAL POWER COMMISSION.

---

BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI.

---

Opinions Below.

---

The first opinion of the Court of Appeals (R. Vol II, p. 982) is officially reported as *Alabama Power Company v. McNinch*, 94 F. (2d) 601. Neither the second opinion of the Court of Appeals (R. Vol. II, p. 864) nor the memorandum opinion of the district court (R. Vol. II, p. 944) has been officially reported.

Jurisdiction.

Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, 28 U. S. C. A. 347, and Section 313 of the Fed-

eral Power Act, added by the Act of August 26, 1935, c. 687, Title II, Section 213, 49 Stat. 860, 16 U. S. C. A. See 825L. The first decree of the Court of Appeals (R. Vol. II, p. 1020) was entered September 27, 1937; the second decree of the Court of Appeals was entered on March 30, 1942 (R. Vol. II, p. 893) and application for rehearing was denied April 29, 1942 (R. Vol. II, p. 910).

### **Statute Involved.**

The statute involved is the Federal Power Act, 41 Stat. 1063, 46 Stat. 797, 49 Stat. 863 (16 U. S. C. A. 791a-825r).

### **Statement of the Case.**

A statement of the case pertinent to the reasons relied upon for the granting of the writ is contained in the petition at pages 3 to 6, inclusive.

### **Specification of Errors to be Urged.**

1. The Court of Appeals erred in holding that when a corporation acquires a completed licensed project, together with unlicensed utility properties, for a consideration equal to the recorded book value of such properties, the Federal Power Commission may lawfully require such corporation to write out of its general investment accounts an amount of such consideration equal to the amount thereafter disallowed by such Commission as actual legitimate original cost of the licensed project (R. Vol. II, pp. 882, 888).

2. The Court of Appeals erred in holding that the Federal Power Commission may lawfully order the write-off described in question (1) above in a proceeding for the determination of actual legitimate original cost only, and without notifying Petitioner that such action is proposed (R. Vol. II, p. 877).

3. The Court of Appeals erred in holding that the Federal Power Commission had jurisdiction to eliminate from the general investment accounts of Petitioner the amounts disallowed by the Commission as actual legitimate original cost of the project (R. Vol. II, pp. 870-77, 892).

4. The Court of Appeals erred in holding that Petitioner had been granted a hearing upon the question of whether amounts disallowed as actual legitimate original cost of the project should be eliminated entirely from the investment accounts of Petitioner (R. Vol. II, pp. 877, 890, 892).

5. The Court of Appeals erred in holding that the Federal Power Commission had authority to order the write-off described in question (1) above in the absence of a finding by the Federal Power Commission that the amounts carried in Petitioner's general investment accounts exceeded Petitioner's true investment in assets of continuing value.

6. The Court of Appeals erred in holding that Petitioner had foregone the right to insist upon a hearing on the question whether disallowed actual legitimate original cost should be eliminated from the general investment accounts of Petitioner (R. Vol. II, p. 891).

7. The Court of Appeals erred in holding that taxes paid on project lands more than three years prior to beginning of construction of project structures are not properly part of actual legitimate original cost of such project (R. Vol. II, pp. 1012-15).

8. The Court of Appeals erred in holding that interest on expenditures incurred more than three years prior to the beginning of construction of project structures was not properly part of the actual legitimate original cost of such project (R. Vol. II, pp. 1015-16).

9. The Court of Appeals erred in affirming Respondent's determination of the value of project lands and water rights

which was based solely upon the purchase price of stock of companies owning lands and water rights insufficient for development of the project (R. Vol. II, pp. 992, 1002-07, 868).

10. The Court of Appeals erred in holding that in a transaction where bonds of a purchaser were given for property, the consideration paid was the market value of such bonds rather than the principal amount thereof (R. Vol. II, p. 1004).

11. The Court of Appeals erred in affirming a holding of the Respondent that a fee or profit reasonable in amount paid to an affiliated contractor corporation for the construction of a licensed project is not allowable as actual legitimate original cost of such project (R. Vol. II, p. 1008-12).

12. The Court of Appeals erred in holding that no new corporation was formed under the laws of Alabama in the merger or consolidation of July 29, 1913 (R. Vol. II, p. 1002).

13. The Court of Appeals erred in holding that cost was not incurred in the merger or consolidation of July 29, 1913 (R. Vol. II, p. 994, 1002).

## I.

**Respondent's order that disallowed items be charged to petitioner's earned surplus account is void as a denial of due process of law in that petitioner was afforded no notice or hearing on the question whether the amount of such disallowed cost items should be eliminated from accounts reflecting petitioner's investment in its utility properties nor does the record reveal any finding in support of such order.**

The notices given Petitioner (R. Vol. I, p. 153, 616) purported to be of a hearing for the determination of actual legitimate original cost of the project. At the hearings no

proposal was made by the Commission's staff with respect to the disposition of such items as might be disallowed and there was no testimony with respect thereto. The Commission's order, however, requires elimination of the disallowed amounts from the general investment accounts of Petitioner by charge of such amount to the earned surplus account of Petitioner<sup>3</sup> (R. Vol. I, pp. 19, 21).

Petitioner's position is that amounts other than actual legitimate original cost may be retained in investment accounts if such amounts represent investment in assets of continuing value. Whether investment accounts reflect such investment presents wholly different questions from the questions involved in whether such accounts reflect actual legitimate original cost. Consequently, Petitioner insists that it has had no hearing on issues necessary to be determined before Petitioner can be lawfully ordered to eliminate the amounts from its investment accounts.

That amounts other than actual legitimate original cost may be lawfully retained in asset accounts is evident from the decision of this Court in the case of *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, 240-241, 81 L. Ed. 142, 149-150. That elimination of such amounts

<sup>3</sup> Section 301(a) of the Federal Power Act [16 U. S. C. A. 825(a)] upon which Respondent bases its accounting authority, provides in part as follows:

"The Commission *after notice and opportunity for hearing may determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited.*"

Such section also provides in part as follows:

"(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation rates, shall notify each State commission having jurisdiction with respect to any public utility involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations. June 10, 1920, c. 285, § 302, added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 855."

The record is devoid of any notice to the Alabama Public Service Commission that Respondent proposed the action here challenged.

as do not represent "original cost" but do represent investment in assets of continuing value would raise serious constitutional questions is also clear from that decision. The court in that case, in commenting on account 100.4, which corresponds to 100.5 in the Uniform System of Accounts which is prescribed for Petitioner and in which account is entered amounts representing the difference between original and present cost, said:

" \* \* \* The Commission is not under a duty to write off the whole or any part of the balance in 100.4 if the difference between original and present cost is a true increment of value. On the contrary, only such amount will be written off as appears upon an application for appropriate directions to be a fictitious or paper increment. \* \* \*" (p. 240.)

On the request of the court, the Assistant Attorney General stipulated:

" \* \* \* that amounts included in Account 100.4 that are deemed, after a fair consideration of all the circumstances to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and in accordance with paragraph (C) of Account 100.4 provision will be made for their amortization." (p. 241.)

The court then added:

" \* \* \* The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment. (pp. 241-242.)

" \* \* \* By being included in the adjustment account, it is classified as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment. \* \* \*

What disposition of their content may afterwards be suitable upon discovery that particular items have been carried at an excessive figure must depend upon evidentiary circumstances, difficult to define or catalogue in advance of the event. \* \* \* (p. 242).

The question which the Supreme Court was not called upon to settle in the above case because of the concession of the Attorney General is now squarely raised by the order, review of which is now sought.

Petitioner in its motion for a stay order pointed out to the court below that the investment accounts of Petitioner reflect a consideration paid in a consolidation in 1927 by Petitioner, a new corporation formed at that time, for varied licensed and unlicensed public utility properties of the three corporations involved, of which one was the owner of this licensed project (R. Vol. II, p. 859), and Petitioner maintains that the consideration so paid must be taken into consideration before determining whether its investment accounts are overstated.

The holding of the court below (R. Vol. II, p. 877) that the disposition ordered by the Commission was an issue in the hearings before the Commission is apparently based upon a failure to give effect to the distinction between project accounts reflecting actual legitimate original cost and the general investment accounts of Petitioner.<sup>4</sup>

---

<sup>4</sup> That entire elimination of the amounts in question from the investment accounts of Petitioner was not considered to be an issue by the Commission in the first hearing is clearly shown by the fact that no such elimination was required by the Commission's first order (R. Vol. I, p. 15). The notice of the second hearing (R. Vol. I, p. 616) does not indicate any change in the Commission's proposal in this regard.

The statement in the court's opinion (R. Vol. II, p. 889) that Petitioner had been unable to suggest any alternative to the accounting disposition ordered by the Commission is in error [see application for rehearing (R. Vol. II, p. 906-7)].

Under these circumstances, Petitioner maintains that it is clear that the Commission has not met the standards required by the decisions of this court<sup>5</sup>:

"\* \* \* The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan v. United States*, 304 U. S. 1, 18-19, 82 L. Ed. 1129.

Petitioner has heretofore attempted to demonstrate that no issue with respect to the amounts contained in its general investment accounts was involved in the present proceeding, nor was any hearing granted Petitioner on such issue. Even had there been such an issue and hearing, the order requiring a reduction in the stated investment of Petitioner in its utility properties as a whole would not be valid in the absence of a finding that the amounts carried in Petitioner's general investment accounts exceeded Petitioner's true investment in assets of continuing value. The record in this case is devoid of any such finding by the Commission and the order complained of is, therefore, invalid. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431-433, 79 L. Ed. 446; *Mahler v. Eby*, 264 U. S. 32, 44-45, 68 L. Ed. 549; *Wichita R. R. Co. v. Public Utilities Commission*, 260 U. S. 48, 58-59, 67 L. Ed. 124.

---

<sup>5</sup> See also *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 57 L. Ed. 431; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. Ed. 1093; *Shields v. Utah-Idaho Ry. Co.*, 305 U. S. 177, 83 L. Ed. 111.

## II.

**Respondent exceeded its jurisdiction in requiring charge of disallowed items to petitioner's earned surplus account.**

Section 201 of the Federal Power Act reads in part as follows:

"Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*" (Emphasis supplied.)<sup>6</sup>

Respondent has no jurisdiction over intrastate rates [16 U. S. C. A. 824(b)]. It has no jurisdiction over the issuance of Petitioner's securities [16 U. S. C. A. 824(c) (f)]. The Commission has no jurisdiction over generation facilities (other than licensed projects) or intrastate distribution facilities except for very limited purposes [16 U. S. C. A. 824(b)].

It is the position of Petitioner that Respondent has no jurisdiction over Petitioner's general accounts to such an extent that it may, as it has done in the order here involved, require Petitioner to eliminate from its accounts capitalization of assets lawfully made under the laws of the State of Alabama nearly twenty-nine years ago. Such an order

<sup>6</sup> Petitioner was expressly relieved by its license from maintaining a system of accounts prescribed by the Federal Power Commission so long as its accounts remained regulated by state authority (R. Vol. I, p. 76).

is in derogation of the laws of the state regulating capitalization of utilities,<sup>7</sup> the rights and obligations of Petitioner and its stockholders and the general jurisdiction of the Alabama Public Service Commission over the accounts of Petitioner.<sup>8</sup> Such order also tends to affect the rights of Petitioner and the issuance of its securities over which the Respondent has no jurisdiction, contrary to the express policy of the Federal Power Act.

The present construction of the Federal Water Power Act by Respondent as permitting regulation by it of matters which are subject to state regulation is contrary to the statements of the purpose of such act by its advocates and sponsors in Congress, as appears from the following excerpts from the testimony of witnesses in the hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Seventy-Fourth Congress, First Session, on H. R. 5423, Part I:

“Mr. Merritt: Returning for a moment to Section 209—

“Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rules, regulations, practices, facilities, or service—

“And so forth.

“That does not say anything about interstate commerce; *but is that inferred?*

“Commissioner Seavey: Yes; *the jurisdiction only goes to interstate* and if there is any doubt about that, language should be put in there; but it is believed that covers it (Hearings, p. 410).

“The Chairman: Then, could there be any good reason why there should not be some authority that would control that the States cannot control?

---

<sup>7</sup> Alabama Code 1940, Title 10, Section 26; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 425 (9 So. 129, 135), and *State, ex rel. White v. Citizens Light & Power Co.*, 172 Ala. 232, 236 (55 So. 193, 194).

<sup>8</sup> Ala. Code 1940, Title 48, Sections 41-46, 302-322.

"Commissioner Seavey: I do not know of any reason why.

"The Chairman: And is not that what you are talking about?

"Commissioner Seavey: That is what I am talking about.

"The Chairman: *And that you are driving at here by this law, whatever the language, to control that part of this business that the States themselves cannot control and that the States themselves would not control, in order that it might help them control the things that are in their States?*

"Commissioner Seavey: That is true.

"The Chairman: And that is what you are offering here as an amendment to the present law.

"Commissioner Seavey: Yes. (Hearings, p. 427.)

\* \* \* \* \*

"Mr. Bulwinkle: The reason I asked, Mr. DeVane, I notice in the papers that the Georgia Utilities Commission announced that they were coming to Washington to fight this bill.

"Mr. Chairman: Yes; on the theory that it was taking away from them some of their jurisdiction; not on any other theory, because I think I have talked with practically every Congressman from Georgia or every one of them has talked to me about it, and upon being assured that this bill did not take jurisdiction away from their commission, they seemed to be perfectly satisfied.

"Mr. DeVane: Due to the error that occurred in subsection 201(a) there was plenty of justification for the effort that has been made to convince State commissions that it was the purpose of this bill to take power away from them, and that representation could be fairly made to them, and since the bill has been introduced, I have heard it stated that was the concealed purpose of this commission, and probably might be the intention of Congress; but I want to make it perfectly clear here that it is not the purpose or de-

sire of the Commission, and we trust that when the legislation comes out of Congress that it will leave to the State commissions as much authority as can be left with them.

"The Chairman: And you want the act to be perfectly clear on that point.

"Mr. DeVane: I want the act to be perfectly clear on that point." (Hearings, p. 529.)

The congressional intent not to encroach upon the field of regulation reserved to the states is further shown by the following statement from the report of the Senate Committee on Interstate Commerce as a result of its hearings on the legislation in question (S. 2796):

"Section 201—Subsection (a) contains a declaration of the necessity for Federal regulation and defines the scope of that regulation. \* \* \* It also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission." (Report No. 621, 74th Congress, 1st Session, p. 48.)

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

H. C. KILPATRICK,  
P. W. TURNER,  
WALTER BOULDIN,  
W. M. MOLONEY,  
*Attorneys for Petitioner.*

MARTIN, TURNER & McWHORTER,  
600 North 18th Street,  
Birmingham, Alabama,  
Of Counsel.

## INDEX

---

	Page
Opinions below-----	1
Jurisdiction-----	2
Questions presented-----	2
Statutes involved-----	3
Statement-----	4
Argument-----	11
Conclusion-----	18
Appendix-----	19

### CITATIONS

Cases:

<i>Alabama Power Co. v. McNinch</i> , 94 F. (2d) 601-----	11, 12
<i>American Surety Co. v. Baldwin</i> , 287 U. S. 156-----	12
<i>American Telephone &amp; Telegraph Co. v. United States</i> , 299 U. S. 232-----	17
<i>Clarion River Power Co. v. Smith</i> , 59 Fed. 861, certiorari denied, 287 U. S. 639-----	14
<i>Falstaff Brewing Corp. v. Thompson</i> , 101 F. (2d) 301-----	12
<i>Kansas City So. Ry. Co. v. United States</i> , 231 U. S. 423-----	14
<i>Louisville Gas &amp; Electric Co. v. Federal Power Commission</i> , No. 8564, C. C. A. 6, decided June 29, 1942-----	12, 15, 16, 17
<i>National Labor Relations Board v. Mackay Radio &amp; Tele- graph Co.</i> , 304 U. S. 333-----	16
<i>Norfolk and Western Ry. Co. v. United States</i> , 287 U. S. 134-----	14
<i>Northern States Power Co. v. Federal Power Commission</i> , 118 F. (2d) 141-----	10, 12, 15, 17
<i>Northwestern Electric Co. v. Federal Power Commission</i> , 125 F. (2d) 882-----	15, 16
<i>Sprague v. Ticonic National Bank</i> , 307 U. S. 161-----	11
<i>Stoll v. Gottlieb</i> , 305 U. S. 165-----	12
<i>Sunshine Anthracite Coal Co. v. Adkins</i> , 310 U. S. 381-----	12
<i>Thompson v. Maxwell Land Grant Co.</i> , 168 U. S. 451-----	11
<i>Treinies v. Sunshine Mining Co.</i> , 308 U. S. 66-----	12
<i>United States v. Appalachian Electric Power Co.</i> , 311 U. S. 377-----	14

**Statutes:**

	Page
<b>Federal Power Act of 1935:</b>	
Section 3 (13) -----	19
4 (b) -----	19
8 -----	16, 20
10 (d) -----	21
10 (e) -----	21
14 -----	22
20 -----	23
201 (a) -----	15, 24
301 (a) -----	14, 24
<b>Miscellaneous:</b>	
S. Rep. No. 621, 74th Cong., 1st Sess., p. 53 -----	15
Seventeenth Annual Report of the Federal Power Commission (1937), p. 5 -----	15

# In the Supreme Court of the United States

OCTOBER TERM, 1942

---

No. 229

ALABAMA POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinions of the Court of Appeals (2 R. 982-1020, 864-892)<sup>1</sup> are reported in 94 F. (2d) 601 and 128 F. (2d) 280. The memorandum opinion of the Supreme Court of the District of Columbia (2 R. 944-945), together with its findings of fact and conclusions of law (2 R. 945-951), is not officially reported. The opinions of the Federal Power Com-

---

<sup>1</sup> The two volumes of printed record filed with the petition in this case (consisting of an appendix to petitioner's brief in the Court of Appeals and a Transcript of Record in the Supreme Court) will be referred to in this brief in opposition as 1 R. and 2 R., respectively.

mission are reprinted in the record (1 R. 561-608, 612-615, 781-798).

#### JURISDICTION

The judgment of the Court of Appeals (2 R. 893) was entered on March 30, 1942. A petition for rehearing was denied on April 29, 1942 (2 R. 910). The petition for a writ of certiorari was filed on July 14, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

Following extensive hearings, the Federal Power Commission, by opinion and orders, determined (pursuant to sections 3 (13) and 4 (b) of the Federal Power Act) the actual legitimate original cost of petitioner's licensed hydroelectric project, disallowing certain items claimed as cost by petitioner, and required the setting up of accounts to reflect this determination. On appeal from a decree of the Supreme Court of the District of Columbia refusing to enjoin the Commission's orders, the court below affirmed the Commission's determination except as to three items which were remanded for further proceedings. Petitioner did not seek certiorari. Following hearing on the remanded items the Commission supplemented its previous determination and ordered petitioner to correct its accounts accordingly and to charge the disallowed amounts of claimed cost to surplus. On request

for rehearing, the Commission stayed its order and directed petitioner to show cause in writing why the prescribed accounting requirements should not be made effective and to submit such accounting treatment as petitioner proposed for disposition of the disallowed amounts. In response to the order to show cause, petitioner proffered no accounting or other testimony and admitted that it could not "propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission." Thereupon, the Commission dissolved the stay and directed compliance with the accounting requirements. On review, the Commission's orders were affirmed by the court below. The questions are:

1. Whether petitioner may now question the correctness of the Commission's determination of the actual legitimate original cost of petitioner's licensed project.<sup>2</sup>
2. Whether the Commission may require petitioner to correct its accounts to reflect such determination by charging the disallowed items of claimed cost to surplus.

#### **STATUTES INVOLVED**

The relevant provisions of the Federal Power Act of 1935 are set forth in the Appendix, *infra*, pp. 19-25.

---

<sup>2</sup> In the event that the petition for a writ of certiorari is granted, respondent reserves the liberty to urge the correctness of the Commission's determination.

**STATEMENT**

Petitioner, Alabama Power Company, is the holder of a license dated June 27, 1921<sup>3</sup> (1 R. 55-69), issued by the Federal Power Commission under the Federal Water Power Act, for the Mitchell Dam hydroelectric project on the Coosa River in Alabama (2 R. 945). Pursuant to the provisions of the statute and of the license, licensee on March 29, 1930, filed with the Commission a verified statement claiming \$10,646,056.76 as the actual legitimate original cost of the project as of December 31, 1925 (1 R. 88-119). The results of an audit by the Commission staff were embodied in a preliminary accounting report dated May 31, 1930 (1 R. 119-150). Those expenditures which were considered proper charges to the project were recommended for approval and the remainder of the claim, together with certain proposed additions, was suspended for the Commission's consideration. This report was served on licensee (2 R. 946), which filed its protest thereto and requested a hearing (1 R. 150-153). Pursuant to order (1 R. 153-154), a hearing was held before the full Commission with submission of oral and documentary evidence, briefs, and oral argument by counsel (2 R. 946). On June 30, 1932, the Commission rendered an

---

<sup>3</sup> The Alabama Power Company to which the license was issued in 1921 was consolidated with two other companies in 1927 to form petitioner Alabama Power Company (2 R. 859).

opinion (1 R. 561-608), and on November 7, 1932, entered an order (1 R. 15-17) determining the actual legitimate original cost of the project.<sup>4</sup> In so doing the Commission disallowed certain items of the claimed cost.<sup>5</sup> Upon request for rehearing (1 R. 608-612), the Commission on December 19, 1932, rendered a second opinion (1 R. 612-615) and order (1 R. 18), making a minor adjustment in its determination of the actual legitimate original cost of the project.

Thereafter, on May 31, 1933, petitioner filed a bill of complaint in the Supreme Court of the District of Columbia seeking to enjoin enforcement of the Commission's orders, taking exception to all the

---

<sup>4</sup> The Commission's order further provided (1 R. 17) :

"1. That the licensee establish and maintain control ledger sheets or accounts with reference to said project showing a total debit balance in its fixed capital accounts beginning with an entry of \$7,098,512.51 as the actual legitimate original cost of said project as of December 31, 1925;

"2. That said licensee establish and maintain subsidiary ledger sheets or accounts or records, showing and substantiating all entries in such control account, and classifying the total for fixed capital in appropriate detail and in accordance with the commission's rules, regulations, and decisions."

<sup>5</sup> The principal items disallowed were: (1) construction fee paid to licensee's affiliate (1 R. 580-581); (2) excess over incremental cost of supplying electric energy for use in construction of the project (1 R. 582-583); (3) taxes and interest not applicable to the construction period (1 R. 581, 583-584); (4) portion of \$3,500,000 Undistributed Fixed Capital, which petitioner had set up as a charge to lands and water rights, in excess of actual cost of lands and water rights (1 R. 569-574).

disallowed items (2 R. 910-911).<sup>6</sup> Following a trial on the merits,<sup>7</sup> the court made findings of fact and announced conclusions of law (2 R. 945-951), filed a memorandum opinion (2 R. 944-945), and entered a decree on December 11, 1935, dismissing the complaint (2 R. 951).

On appeal (2 R. 951-954) the United States Court of Appeals for the District of Columbia reviewed the provisions of the statute and concluded (2 R. 987) that the Commission was authorized "to determine the actual legitimate original cost of a project and to require a licensee to set up its books showing the cost as thus determined." The court reviewed the Commission's determinations and affirmed most of them, but held that (1) the Commission should have found and allowed (a) "the total cost, exclusive of profit" of electric energy furnished by petitioner to the project during its construction, instead of merely the incremental or out-of-pocket cost of such energy (2 R. 1016-1018), and (b) the project's portion of the actual legitimate original cost of Lock 15 water rights (2 R. 1007-1008) and that (2) "since the case must be returned to the Commission in re-

---

<sup>6</sup> This was prior to the enactment of section 313 (b) of the Federal Power Act, providing for direct review in the circuit courts of appeals.

<sup>7</sup> At the trial, licensee's accounting witness testified that to set up the accounts required by the Commission's orders "eliminating from the fixed capital records of Alabama Power Company the items which have been disallowed as the cost of this project" would cost about \$5,000 (2 R. 801).

spect of the foregoing items, it would be proper for the Commission to allow the licensee further opportunity to introduce evidence of the cost of financing, engineering, and promotional services prior to 1913 included in the Power Company's claimed figure of \$3,500,000" (2 R. 1020). Accordingly the decree of the trial court was reversed with orders to direct the Commission to proceed in accordance with the opinion (2 R. 1020-1021). Petitioner's motion for modification of the decree (2 R. 1021-1022) was denied January 6, 1938 (2 R. 1026). Petitioner did not seek certiorari.

The Commission held a hearing on the remanded items (1 R. 616-673) and on November 26, 1940, in accordance with its opinion (1 R. 781-798), entered an order (1 R. 19-22) allowing \$51,966.58 as the total cost of electric energy furnished to the project during construction, and \$66,603.78 as the actual legitimate original cost of that part of the water rights at Lock 15 allocable to the Mitchell Dam project.<sup>8</sup> The Commission found that there was no evidence before it of the cost of the financing, promotional, and engineering services, and no allowance therefor was made (1 R. 787-788). The order required petitioner to set up its books showing the amounts allowed as actual legitimate original cost and to transfer amounts carried in the asset accounts not representing the cost of some

---

<sup>8</sup> Because of these additional allowances \$26,540.82 more was allowed for interest during construction.

physical property to be charged against earned surplus.<sup>9</sup>

On December 21, 1940, petitioner applied for rehearing (2 R. 22-27), challenging practically all the determinations of the Commission, including those which the Court of Appeals had previously affirmed and of which no further review had been sought. In addition, it alleged that the provisions of the order set forth above were void "because Licensee was given no notice that any such require-

---

<sup>9</sup> The Commission's order of November 26, 1940, provided (1 R. 21-22) :

"(C) The amount of \$3,657,080.83 representing the total of all items disallowed, exclusive of \$183,396.22, the disallowed part of claimed cost appertaining to water rights at Lock 15, be transferred from the project accounts and charged to the earned surplus account pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts Prescribed for Public Utilities and Licensees;

"(D) The amount of \$152,814.31 for organization expenses, the amount of \$66,603.78 for the cost of the Mitchell Dam portion of the Lock 15 water rights, and \$969.97 for interest, allowed in addition to Licensee's original claimed cost shall be charged to the project accounts and the earned surplus account concurrently credited with the total of these items;

"(E) All amounts now carried in the asset accounts as part of the original charges to the cost of the project up to and including December 31, 1925, and not otherwise disposed of by this order, and which do not represent the cost of some physical property other than this project, shall be transferred from such accounts, both control and subsidiary, in which included, and the net amount thereof charged to earned surplus account, pursuant to and in accordance with the applicable provisions of said Uniform System of Accounts."

ments were proposed and was given no opportunity to be heard on any of such requirements. If Licensee was required to comply with any of such requirements, Licensee would be deprived of property without due process of law" (1 R. 26). On January 21, 1941, the Commission stayed Paragraphs C, D, and E of its order and directed licensee to "(1) show cause in writing, under oath, why the accounting instructions and requirements contained in said Paragraphs (C), (D), and (E) of said order should not be made effective and enforced, and (2) submit to the Commission such accounting treatment as the licensee may propose for disposition of the disallowed items of claimed cost" (1 R. 29). In response to the order to show cause (1 R. 29-40), petitioner claimed that the accounting disposition of the disallowed items of cost was not an issue in the proceedings before the Commission (1 R. 29), that petitioner intended to seek court review of the Commission's order which might "affect the proper accounting treatment for the disposition thereof", and that "Licensee respectfully submits that it cannot propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission" (1 R. 39). Upon consideration of the response the Commission found that petitioner's arguments were substantially the same as those which the Commission had rejected by opinion and order in *Northern States Power Co.* Licensee,

33 P. U. R. (N. S.) 279, which was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit. *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141. The Commission further found that petitioner had not proffered any testimony or evidence and had not submitted any other accounting treatment for disposition of the disallowed amounts, and accordingly on April 26, 1941, dissolved the stay and directed petitioner to comply with the order of November 26, 1940 (1 R. 47-48). An application for rehearing (1 R. 49-52) was denied on May 6, 1941 (1 R. 54).

On March 20, 1941, petitioner, pursuant to section 313 (b) of the Federal Power Act, filed a petition for review in the court below (1 R. 1-14), challenging practically all the determinations of the Commission, including those made in the first order and affirmed by the court below in the first appeal, as well as the disposition by the Commission of the items on the remand, and the accounting disposition made by the Commission of the disallowed items.<sup>10</sup>

The court below affirmed the Commission's determination of actual legitimate original cost (2 R. 868-892) and held that the accounting disposition of the disallowed items made by the Commission

---

<sup>10</sup> No review was sought of the Commission's allowance for the item of total cost, exclusive of profit, of electric energy, furnished by petitioner during construction of the project (2 R. 868).

was in all respects proper (2 R. 869-892). It entered judgment accordingly (2 R. 893). A petition for rehearing (2 R. 893-908) was denied (2 R. 910).

#### **ARGUMENT**

The court below held that the Commission properly determined the cost of the Lock 15 water rights (2 R. 866-868), that the Commission properly refused to make any allowance for the alleged cost of financing, engineering, and promotional services rendered prior to 1913 since no evidence was offered on this point (2 R. 868-869),<sup>11</sup> and that the accounting disposition of the allowed and disallowed items of cost was made by the Commission after notice and hearing, and was in all respects proper (2 R. 871-892). This decision was clearly correct.

1. As the court below noted (2 R. 866-868), the Commission determined the cost of the remanded Lock 15 water rights by applying the formula which the court had approved on the first appeal. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 614 (App. D. C.); see 2 R. 868. Petitioner did not seek review of the first judgment of the court below and in the circumstances cannot now urge that the formula adopted was erroneous. *Thompson v. Maxwell Land Grant Co.*, 168 U. S. 451; *Sprague v. Ticonic National Bank*, 307 U. S. 161,

---

<sup>11</sup> Petitioner does not urge as error the holding of the court below on this point, and no review is sought on this item of cost.

167-168; *Falstaff Brewing Corp. v. Thompson*, 101 F. (2d) 301, 306 (C. C. A. 8). The Commission's prior determination of the cost of project lands, and of the amount of taxes and interest during construction, and its disallowance of the fees paid to the affiliated Dixie Construction Company were affirmed by the court below on the first appeal. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 622 (App. D. C.); see 2 R. 951-954. Petitioner, not having then sought further review, may not now question (Pet. 15-17) those determinations and disallowance. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, 75-78; *Stoll v. Gottlieb*, 305 U. S. 165; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166.

2. The Commission's order requiring petitioner to correct its accounts to reflect actual legitimate original cost by charging the disallowed items of claimed cost to surplus was authorized by and is in accordance with the provisions of the Federal Power Act. *Alabama Power Co. v. McNinch*, 94 F. (2d) 601, 606 (App. D. C.); *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141 (C. C. A. 7); *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942. Any accounting disposition of the disallowed items which would not clearly segregate them from the actual legitimate original cost account would run counter to the objectives of the Federal Power Act.

Section 4 (b) of the act requires that upon completion of a licensed project the licensee shall file with the Commission a statement, under oath, "showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands", and authorizes the Commission "to determine the actual legitimate original cost of and the net investment in" such project.<sup>12</sup> Actual legitimate cost is the basis upon which excessive profits are determined and expropriated. During the first twenty years the license is in force such profits may be expropriated to the Government under section 10 (e) of the act by increasing the annual charges paid by the licensee. After the first twenty years of operation excessive profits are segregated in an amortization reserve under section 10 (d) for use in reduction of the licensee's net investment in the project. Actual legitimate original cost also constitutes the rate base used by the Commission in fixing rates (under section 19) which are not regulated by the states and in regulating interstate rates (under section 20). Actual legitimate original cost likewise controls the "just and fair compensation" paid a licensee under section 16 for use of its project in a war or other

---

<sup>12</sup> Section 3 (13) defines "net investment" in a project as the actual legitimate original cost thereof, plus cost of additions and betterments and less certain deductions not here involved.

emergency "involving the safety of the United States." The amount allowed by the Commission as actual legitimate original cost determines the price the Government pays a licensee upon acquisition of its project at the expiration of the license under section 14 or upon a court sale of the project, following a revocation of the license under section 26. *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 427-428; *Clarion River Power Co. v. Smith*, 59 F. (2d) 861 (App. D. C.), certiorari denied, 287 U. S. 639.

To effectuate the purposes of the act, a licensee's accounting must accordingly be adjusted to reflect the Commission's determination of actual legitimate original cost. Section 301 (a) authorizes the Commission to prescribe a system of accounts with which every licensee is required to comply, carrying with it the authority to require proper accounting adjustments. *Kansas City So. Ry. Co. v. United States*, 231 U. S. 423, 440; *Norfolk and Western Ry. Co. v. United States*, 287 U. S. 134, 141.

Petitioner's contention that the Commission was without jurisdiction to enter its accounting order on the ground that "such an order is in derogation of the laws of the State regulating capitalization of utilities" (Pet. 21-22) is plainly without substance. Section 301 (a) of the act in requiring that "every licensee" shall keep such accounts as the Commission prescribes, expressly provides that "nothing in this Act shall relieve any public utility

from keeping any accounts \* \* \* which such public utility may be required to keep by or under authority of the laws of any State." The corrective accounting prescribed by the Commission in no way infringes on state authority since "each Commission is empowered to act within its own field." *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141, 144 (C. C. A. 7); *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882, 885 (C. C. A. 9); *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942; see S. Rep. No. 621, 74th Cong., 1st Sess., p. 53.<sup>13</sup> As the court below stated (2 R. 871-

<sup>13</sup> The statement in section 201 (a) of Part II of the act that the Commission's jurisdiction over generation, transmission, and sale of electric energy at wholesale in interstate commerce by electric utility companies shall "extend only to those matters which are not subject to regulation by the States" is irrelevant since the language of section 201 (a) clearly shows that this statement has no application to the Commission's jurisdiction over projects licensed under Part I of the act.

Petitioner's contention (Pet. 17) that "the record is devoid of any notice to the Alabama Public Service Commission that Respondent proposed the action here challenged," as allegedly required by section 302 (b) of the act, is raised for the first time in the petition for certiorari, and in view of section 313 (b) of the act cannot be considered. Moreover, the contention is clearly erroneous. The Commission's Uniform System of Accounts was developed in closest cooperation with state commissions (17th Annual Report of the Federal Power Commission (1937), p. 5), and the audit of the records underlying petitioner's claim in this case was made jointly with the Alabama Public Service Commission (1 R. 126).

872), Alabama could require petitioner to keep a separate set of books for purposes of state law, and if the company chose it might keep a third set for its own purposes.

Petitioner's contention (Pet. 16-17) that, despite the "full, elaborate and long-continued hearings" (2 R. 888) held by the Commission, the order prescribing accounting requirements was entered without notice or hearing is similarly without merit. The Commission stayed its order for the express purpose of permitting petitioner to show cause why the accounting requirements it had prescribed should not be made effective and to submit such accounting treatment as petitioner proposed for disposition of the disallowed amounts (1 R. 29). In response to the order to show cause, petitioner admitted that it could not "propose at this time authoritative accounting treatment for disposition of the items of cost purportedly disallowed by the Commission," and petitioner neither proffered nor indicated any accounting or other testimony (1 R. 39). The order to show cause was sufficient. *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942; see also *Northwestern Electric Co. v. Federal Power Commission*, 125 F. (2d) 882 (C. C. A. 9).<sup>14</sup>

---

<sup>14</sup> "The Fifth Amendment guarantees no particular form of procedure." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 351.

The fact that petitioner was the successor to the original licensee upon the consolidation of the latter with two other companies "in no way affects the actual legitimate original cost" of this project (2 R. 882). Section 8 of the Act provides that upon transfer of a license "any successor or assign of the rights of such licensee \* \* \* shall be subject \* \* \* to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder \* \* \*". See *Louisville Gas & Electric Co. v. Federal Power Commission*, No. 8564 (C. C. A. 6), decided June 29, 1942.

As the Court of Appeals held (2 R. 882-889), the decision in *American Telephone & Telegraph Co. v. United States*, 299 U. S. 232, does not support petitioner's objections (Pet. 9, 17-19) to the elimination from its project accounts of the difference between actual legitimate original cost and the investment of petitioner to acquire the project of its predecessor. This Court was there concerned with the reclassification of the accounts of the telephone companies, subject to regulation by but which are not licensees of the Government, on the basis of original cost, and with the determination of the nature and proper disposition of the excess in invested value over original cost. In the present case, however, petitioner voluntarily obtained a license for its project and thereby accepted the statutory standard of actual legitimate origi-

nal cost (section 6; see *Northern States Power Co., Licensee*, 33 P. U. R. (N. S.) 279, aff'd, *Northern States Power Co. v. Federal Power Commission*, 118 F. (2d) 141 (C. C. A. 7)). Since the disallowed amounts were found not to be part of the actual legitimate original cost of petitioner's project, they necessarily represent "false rather than genuine" items and there is "no further question to be determined concerning them" (2 R. 888-889).

#### CONCLUSION

The decision below is correct. There is no conflict, and the case presents no question calling for further review. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

CHARLES FAHY,  
*Solicitor General.*

FRANCIS M. SHEA,  
*Assistant Attorney General.*  
DAVID L. KREEGER,  
ELLIS LYONS,  
*Attorneys.*

RICHARD J. CONNOR,  
*General Counsel.*

CHARLES V. SHANNON,  
*Assistant General Counsel.*

STANLEY M. MORLEY,  
*Attorney,*  
*Federal Power Commission.*

AUGUST 1942.

## APPENDIX

---

Section 3 (13) of the Federal Power Act of 1935,  
49 Stat. 839 (16 U. S. C. sec. 796 (13)) provides  
as follows:

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission.

Section 4 (b) of the Federal Power Act of 1935,  
49 Stat. 839 (16 U. S. C. sec. 797 (b)) authorizes  
and empowers the Commission—

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

Section 8 of Part I of the Federal Power Act of 1935 (16 U. S. C. sec. 801), formerly Section 8 of the Federal Water Power Act of 1920, 41 Stat. 1068, provides:

SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under

which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

Section 10 (d) and (e) of the Federal Power Act of 1935, 49 Stat. 843 (16 U. S. C. secs. 803 (d) (e)) provides:

(d) That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of the Part; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is

reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require; \* \* \*

Section 14 of the Federal Power Act of 1935, 49 Stat. 844 (16 U. S. C. sec. 807) provides:

SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be deter-

mined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Section 20 of Part I of the Federal Power Act of 1935 (16 U. S. C. sec. 813), formerly Section 20 of the Federal Water Power Act of 1920 (41 Stat. 1073) provides as follows:

SEC. 20. \* \* \*

\* \* \* \* \*

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act.

Section 201 (a) of the Federal Power Act of 1935, 49 Stat. 847 (16 U. S. C. sec. 824) provides as follows:

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

Section 301 (a) of the Federal Power Act of 1935, 49 Stat. 854 (16 U. S. C. sec. 825) provides as follows:

SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however,* That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or

records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.